In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-567

JOSEPH EDWIN PEEL, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-593

RICHARD NEIL MYERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that an indictment charging assault on an officer of the Drug Enforcement Administration was insufficient to state a crime under 18 U.S.C. 111 and 1114, since these statutes refer only to officers of the Bureau of Narcotics and Dangerous Drugs, the predecessor of the Drug Enforcement Administration.

In August 1973, petitioners moved to dismiss an indictment in the United States District Court for the Southern District of Texas charging them with assault on an officer

of the Drug Enforcement Administration. The district court granted the motions on the grounds that 18 U.S.C. 1114 does not specifically mention the Drug Enforcement Administration and does not include successor agencies to those specified and that, therefore, the indictment failed to charge an offense (Pet. App. A1-A4). The court of appeals reversed (Pet. App. A6-A14; 497 F.2d 1369).

Petitioners contend that the indictment charging assault of an officer of the Drug Enforcement Administration does not charge an offense under 18 U.S.C. 111 and 1114, which proscribe the assault of an officer of the Bureau of Narcotics and Dangerous Drugs, the predecessor of the Drug Enforcement Administration, because: (a) the statutes must be strictly construed; (b) neither the language of the statutes nor their legislative history supports the construction by the court below; (c) the savings statute (5 U.S.C. 907(a)) is not applicable; and (d) the statutes as construed below violate the petitioners' right to due process and constitute *ex post facto* laws.

There are no constitutional impediments to the court of appeals' construction of Sections 111 and 1114, and 5 U.S.C. 907(a). As the court below noted, the concept of strict construction does not require that the savings statute 5 U.S.C. 907(a)) be disregarded where, as here, petitioners could not "validly" argue that they "were not given adequate notice of the prohibited conduct, that is, the assault of a federal officer" (Pet. App. A12; 497 F.2d at 1373). The courts of appeal have uniformly recognized that in prosecutions under 18 U.S.C. 111, the government is not required to prove that the defendant knew that the victim of the assault was a federal officer. See *United States* v. *Perkins,* 488

F.2d 652 (C.A. 1);[1] *United States* v. *Ulan*, 421 F.2d 787 (C.A. 2); *United States* v. *Goodwin*, 440 F.2d 1152 (C.A. 3); *United States* v. *Wallace*, 368 F.2d 537 (C.A. 4), certiorari denied, 386 U.S. 976; *United States* v. *Young*, 464 F.2d 160 (C.A. 5); *United States* v. *Kiraly*, 445 F.2d 291 (C.A. 6), certiorari denied, 404 U.S. 915; *United States* v. *Ganter*, 436 F.2d 364 (C.A. 7); *United States* v. *Leach*, 429 F.2d 956 (C.A. 8) (dictum), certiorari denied, 402 U.S. 986; *United States* v. *Kartman*, 417 F.2d 893 (C.A. 9). Moreover, as the court below noted, "[It is certainly not an element of a section 111 offense that the defendant know the specific name of the agency by which his victim is employed" (Pet. App. A-12; 497 at F. 2d 1373).

Petitioners' remaining contentions were properly rejected by the court of appeals. We rely upon the following portion of its opinion (Pet. App. A9-A11; 497 F.2d at 1371-1372):

> The district court's memorandum and order concluding that the indictment should be dismissed omits reference to 5 U.S.C. § 907(a), enacted September 6, 1966. Section 907 (a), which provides for continuity of status and function in connection with executive reorganizations, controls the issues presented. * * *

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[1]Since petitioners were charged solely with the substantive offense of assaulting a federal officer, there is no reason to defer disposition here because of the issue pending decision in *United States* v. *Feola*, certiorari granted, No. 73-1123, April 15, 1974: whether in a prosecution for a conspiracy to violate a federal law it is necessary to prove the defendant's knowledge of a jurisdictional element when such knowledge need not be shown in a prosecution for the underlying substantive offense.

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The section's legislative history reflects the clear meaning of the statutory language, that is, the desire of Congress not to leave a hiatus in existing law when a reorganization has taken place. A House Report on the 1949 Reorganization Act, the predecessor of the 1966 reorganization statute, explains that section 907 "contains saving provisions with respect to the status, after a reorganization, of statutory provisions, regulations, and other actions, and suits and other proceedings, having a relation to any agency or function affected by such reorganization." H.R. Rep. No. 23, 82nd Cong., 1st Sess., 1949 U.S. Code Cong. Serv. 1391. In addition, a House Report commenting on a similar saving clause in the original Reorganization Act of 1939 noted that the saving clause "provides for the survival of . . . laws in connection with reorganization." H.R. Rep. No. 120, 76th Cong., 1st Sess. 6 (1939)

Basically, when a reorganization takes place, section 907(a) continues in effect laws existing prior to the reorganization. Any statute relating to an agency and enacted before the effective date of the reorganization of that agency has the same effect as if there had been no reorganization. Thus, special agents of the Drug Enforcement Administration fall within the ambit of section 111, by virtue of the provisions of section 1114, in the same manner as did the special agents of the Bureau of Narcotics and Dangerous Drugs.

On appeal, defendants pose four basic arguments as militating against the application of section 907(a) to their situation. First, they assert that Congress has at times amended 18 U.S.C. § 1114 to reflect changes caused by reorganizations. They refer specifically to the amendment by Congress, as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, of section 1114 to substitute the Bureau of Narcotics and Dangerous Drugs in the Department of Justice for its predecessor, the Bureau of Narcotics in the Treasury Department, 1970 U.S. Code Cong. & Admin. News 1492, § 701(i)(1), Pub.L. 91-513, 84 Stat. 1236. We do not view this as evidence of congressional intent that an amendment of 18 U.S.C. § 1114 was a precondition to the coverage of agents of the Bureau of Narcotics and Dangerous Drugs, to the disregard of 5 U.S.C. § 907(a). No such implication can be garnered from the legislative history of the Act. The provision amending section 1114 was merely one provision of a general statutory program designed to deal with drug abuse; and the amendment came almost two years after the creation of the Bureau of Narcotics and Dangerous Drugs, *see* Reorganization Plan No. 1 of 1968, 1968 U.S. Code Cong. & Admin. News 4734. The hearings on the creation of the Bureau of Narcotics and Dangerous Drugs moreover indicate that amendment of section 1114 was not deemed necessary to the continued coverage of that Bureau's officers. *See* Hearings Before a House Subcomm. on Government Operations, 90th Cong., 2d Sess., at 64 (1968). Indeed, it would ignore the impact of 5 U.S.C. § 907(a) to hold that because Congress

has on previous occasions made a conforming amendment to section 1114 it must do so to protect federal agents in reorganization situations. [Footnotes omitted.]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.[2]

ROBERT H. BORK,
Solicitor General.

FEBRUARY 1975.

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[2]On October 26, 1974—after the court of appeals' decision in this case—Congress amended 18 U.S.C. 1114 to reflect the reorganization transferring the functions of the Bureau of Narcotics and Dangerous Drugs . to the Drug Enforcement Administration (P.L. 93-481, Section 5, 88 Stat. 1456). This amendment does not indicate that Congress believed that Drug Enforcement Administration agents were not previously entitled to the protection of 18 U.S.C. 1114.

Although the legislative history does not indicate Congress' reason for amending Section 114 (S. Rep. No. 93-925, 93d Cong., 2d Sess.), since the reorganization of the Drug Enforcement Administration and the Bureau of Narcotics and Dangerous Drugs had been accomplished on July 10, 1973 (38 Fed. Reg. 18380) the amending of Section 1114 on October 26, 1974, was a housekeeping provision to conform the language of Section 1114 to the accomplished reorganization. Moreover, as the court below noted, in a prior reorganization involving the Bureau of Narcotics and Dangerous Drugs, it was not deemed necessary to amend Section 1114 to conform to the planned reorganization.